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Company Succession in the Netherlands

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Company Law and the Law of Succession

Académie internationale de droit comparé

World Congress 2014 Vienna

Country Report (The Netherlands) by (prof. dr. Wouter Burgerhart and prof. dr. Leon Verstappen, University of Groningen)

1.Importance of family business and business succession

1.1. Datas about the importance of family business

The Netherlands is a small country, with under 17 million inhabitants. Nevertheless, every year about € 13 billion are inherited in the Netherlands. On the average an inheritance amounts up to approximately € 100,000.¹

In the most important Dutch reports on family businesses an enterprise is since 2009 defined as a family firm if it complies to the GEEF (*European Group of Owner Managed and Family Enterprises*) conditions of family enterprise. This definition has been chosen as it is recommended by the European Union and has been used in studies conducted in a number of European countries.²

According to the GEEF-definition a firm, of any size, is a family enterprise, if:³

1. The majority of decision-making rights is in the possession of the natural person(s) who established the firm, or in the possession of the natural person(s) who has/have acquired the share capital of the firm, or in the possession of their spouses, parents, child or children's direct heirs.
2. The majority of decision-making rights are indirect or direct.
3. At least one representative of the family or kin is formally involved in the

¹ Figures from Centraal Bureau voor de Statistiek (Central Office for Statistics).

² European Commission (2009). Final report of the Expert Group. Overview of family-business-relevant issues: Research, networks, policy measures, and existing studies. Enterprise and Industry Directorate-General. <http://ec.europa.eu/enterprise/policies/sme/promoting-entrepreneurship/family-business/>.

³ Source: <http://www.geef.org/definition.php>.

governance of the firm.

4. Listed companies meet the definition of family enterprise if the person who established or acquired the firm (share capital) or their families or descendants possess 25% of the decision-making rights mandated by their share capital.

There are approximately 260.000 family businesses in the Netherlands. This is approximately 69% of all businesses (exclusive one-person businesses). They represent approximately 53% of the Gross National Product and they are responsible for 49% of the employment in the Netherlands. They are the backbone of Dutch economy.⁴

1.2. Business succession in family

The number of business successions is estimated at approximately 100.000 between 2009-2019.⁵ In recent years there were approximately 23.000 successions per year.⁶ These numbers are from different sources and might not be comparable. However, they can be used as an indication.

On the total amount of business transfers, more than 60% (61,7%) have a family relationship between the current and the previous owner. This percentage is significantly higher in family businesses (72,7%) vs. non-family businesses (31.9%).⁷

Regarding the succession, 37,9% of all business transfers is taking place outside the family. This percentage is far higher in non-family businesses

⁴ Family Business in the Netherlands Characteristics and Success Factors, A Report for the Ministry of Economic Affairs, Roberto Flören et.al., Centre for Entrepreneurship Nyenrode Business Universiteit, Breukelen 2010. We would like to thank Albert Jan Thomassen of FBNed, the Dutch association of Family Businesses, for delivering the facts, figures and reports on the succession in family businesses in the Netherlands.

⁵ Cijfers en feiten van het familiebedrijf; 10 jaar onderzoek onder familiebedrijven, BDO Campsobers 2008, p. 36.

⁶ Family Business in the Netherlands Characteristics and Success Factors, A Report for the Ministry of Economic Affairs, Roberto Flören et.al., Centre for Entrepreneurship Nyenrode Business Universiteit, Breukelen 2010.

⁷ Family Business in the Netherlands Characteristics and Success Factors, A Report for the Ministry of Economic Affairs, Roberto Flören et.al., Centre for Entrepreneurship Nyenrode Business Universiteit, Breukelen 2010. p. 16, 17.

(68,1%) vs. family-businesses (27,3%).⁸

About forty percent (40.1%) of Dutch businesses has had at least one business transfer since the founding of the firm. There are no significant differences between family businesses and non-family businesses regarding the business transfer rate. Approximately 22,500 businesses (6%) of all Dutch firms in 2010 were working on a transfer of the firm at that moment, a number consistent with estimates that suggests Dutch firms on average plan the transfer only one to one and a half years in advance of it. 73% of all family businesses are in the first generation, 16% in the second, and 10% in the third or later generation. Of those businesses that have been transferred, 62% of all companies, and 72% of family businesses report a family relationship between the previous and current owners.

The number of second and third generation firms is higher among larger family businesses (i.e. those with at least 10 employees), than among family businesses in general: 17% have reached the second generation whilst 18% is in the third generation or later.⁹

One should realize that the (European) economic crisis might (or will) have effect on the forementioned figures.

1.3. Legal background

In corporate law, no specific attention has been paid to family businesses. However, to ensure continuity of the business, the control of the family business is in practice separated from the financial interest in the company by transferring all the shares to a foundation, which legal entity issues certificates to the entrepreneur. Thus, the control over the company is vested upon a foundation and separated from the holder of the financial interest in the company. During lifetime the entrepreneur controls in many cases as sole

⁸ Family Business in the Netherlands Characteristics and Success Factors, A Report for the Ministry of Economic Affairs, Roberto Flören et.al., Centre for Entrepreneurship Nyenrode Business Universiteit, Breukelen 2010. p. 16, 17

⁹ Family Business in the Netherlands Characteristics and Success Factors, A Report for the Ministry of Economic Affairs, Roberto Flören et.al., Centre for Entrepreneurship Nyenrode Business Universiteit, Breukelen 2010. p. 15, 16.

board member of the foundation the business. But when he dies, the appointment of persons as his successors in the board of the foundation takes effect. The entrepreneur is free as to whom he wants to appoint as his successors in the board of the foundation. These can be heirs or other family members. But he can also appoint other persons.

Furthermore, one has to take in account that the legislative rules governing Dutch private limited liability companies¹⁰ (BV's) as set out in Book 2 of the Dutch Civil Code (hereafter also referred to as DCC)¹¹ have been simplified and made more flexible. This is a consequence of the introduction of the Act on the Simplification and Flexibilisation of the Law governing BV's ('Wet vereenvoudiging en flexibilisering bv-recht') and the related Implementation Act on the Simplification and Flexibilisation of the Law governing BV's ('Invoeringswet vereenvoudiging en flexibilisering bv-recht'). These two Acts are jointly referred to as the 'Flex BV Act'. The Flex BV Act came into effect on 1 October 2012. In practice this new legislation means less prescriptive law and more permissive law, that allows BV's more scope to deviate in their articles of association from the legal standard procedure. This scope can (and is/will) also be used for structuring the succession in family businesses. For instance the forementioned structure with a foundation can nowadays more or less be copied with a private limited liability company using shares without voting rights.

1.4. Tension between company law and inheritance law

As to the Dutch law, there are some tensions between company law and inheritance law. But there are some provisions in especially inheritance law, that deal with some specific kind of tensions.

It occurs for instance when the entrepreneur disposes of his shares, which can run against statutory provisions of the private limited liability company or when the entrepreneur enters into an agreement with provisions that take

¹⁰ In Dutch: besloten vennootschappen met beperkte aansprakelijkheid, or BV's.

¹¹ For the translation of the DCC we used, Hans Warendorf, Richard Thomas, Ian Curry-Sumner, The Civil Code of the Netherlands, Alphen aan den Rijn: Kluwer Law International 2013.

effect upon death and that are contrary to provisions in the partnership agreement. In those cases, company provisions or the provisions in the partnership agreement take precedence.

The inheritance law does not bar the execution of provisions in the last will or in the articles of association or partnerships agreement with regard to the continuity of the business or the company. One of the most important changes in the new inheritance law that came into effect in 2003 is that the forced heirs cannot block the execution of those provisions. If his position is affected by the provisions in the last will of the deceased, he can claim a sum of money, only in certain circumstances. The disinherited forced heir who claims his statutory rights, has only a claim in money. By claiming his sum, he will not become an heir.

There is also a special provision in law, saying that at the request of a debtor (for example the successor who has the obligation to pay the other heirs their share in the inheritance), the district court may determine, where there are important reasons to do so (for example the continuity of the business), that any sum of money due pursuant to the inheritance law or, in connection with the division of a deceased's estate, pursuant to Title 7 of Book 3 DCC, whether or not increased with interest to be specified in its order, need to be paid only after the expiry of a determinate time, either in one lump sum or in instalments. The district court shall thereby have regard to the interests of both parties and may impose, when allowing the request and in order to secure payment of the principal sum and interest, a condition that security in rem or personal security approved by the district court be put up (Art. 4:5 (1) DCC).

These provisions imply that all dispositions with regard to businesses (whether a sole proprietorship, a share in a partnership or shares in a company) will have effect. Statutory claims of forced heirs, which can only be in money, can be mitigated by the court as described before.

To our mind, the heart of the matter in terms of inheritance law and business

succession lies therefore in the *value* of the business, if the business is obtained by means of donation or inheritance law. Indeed, it is the value that determines the scope of the aforementioned economic impediment(s) and therefore the extent to which this impediment can pose a threat to the continuity of the business.¹² The law (DCC or any other civil law) does not provide any description of the value of the deceased's assets to be taken into account for the aforesaid calculation, nor a description of definitions regarding value, valuation principles and valuation methods and relevant factors.

2. Inheritance Law (intestate succession)

2.1. Principles of inheritance law

The Dutch Civil Code consists of nine Books. They vary in age; most of them date from 1992. The fourth Book is titled 'Inheritance Law' and it came into force on 1st January 2003. As of that date the new inheritance law replaced the old Book 4, which dated from 1838. The new law is in many ways different from the old one, especially with regard to the position of the surviving spouse and to the position of forced heirs.

The *first* principle is the right to dispose of one's property by last will. But this is restricted in some ways by statutory law. A testamentary disposition is a unilateral legal act whereby a deceased makes a disposition which will become operative only upon his or her death and which is regulated in the DCC or is so considered by law (Art. 4:42 (1) DCC). This means in general, that the provisions in the last will must be regulated in the DCC or in another law, for example the Law on disposal of death. Agreements which have as their necessary implication the disposal of a deceased's estates which have not yet devolved in their entirety or for a proportionate part shall, however, be null and void (Art. 4:4 (2) DCC).

The *second* basic principle is the *saisine*, or: 'Le mort saisit le vif' (Art. 4:182

¹² See for elaborate research on value in Inheritance Law, Matrimonial Law and in the Dutch Inheritance and Gift Tax Act 1956, the doctoral thesis of Wouter Burgerhart; W. Burgerhart, *Waarde en Erfrecht* (thesis Nijmegen), Deventer: Kluwer 2008.

DCC). The heir is considered as having succeeded to the deceased from the instant of his death. The inheritance does not devolve on a representative of the heirs like an executor or an administrator. This principle also implies that the debts devolve on the heirs at the same time. The heirs have to choose whether to accept the inheritance or to renounce it (Art. 4:190 DCC). If an heir accepts the inheritance, the creditors even can attach his personal property (Art. 4:184 DCC). The in between choice is to accept the inheritance 'beneficiair', under the condition that the assets and debts are described in an inventory (Art. 4:195 DCC). Art. 4:202 ff. DCC on the liquidation of estates apply then. The creditors then only can attach the goods of the estate, not also the personal property of the heir.

The *third* basic principle, related to the second one, is that the heirs are responsible for settling the estate. They are the ones who primarily take care of paying all debts of the deceased and carry out the will of the testator. If any difficulty arises, the settling of the estate becomes more formal. Art. 4:202 ff. DCC on the liquidation of estates apply.

As the *fourth* basic principle of Dutch Succession Law, one may consider the main principle of intestate succession. Dutch Law has the parentela system as point of departure. The list of persons who can inherit (on their own account) is included in Art. 4:10(1) DCC.

The *fifth* basic principle is that a compulsory or legitimate portion/forced share of so called forced heirs is an entitlement to a part of the value of the deceased's estate. The forced heir may claim this part despite certain gifts or testamentary dispositions (with exceptions) made by the deceased or certain gifts. So this forced share is not a right *in rem*, but a claim in money (Art. 4:63 ff. DCC).

The *sixth* basic principle is that – apart from some exceptions in Art. 4:97-107 DCC - a last will may only be made by a notarial instrument or by a holograph instrument given to a notary for safekeeping (Art. 4:94 (1) DCC). This means that in practice, the vast majority of last wills are drawn up by the notary and

registered in the Central Registration of Last Wills in The Hague.

Both *intestate* succession and *testamentary* succession exist in Dutch Law (Art. 4:1 DCC), as it does in almost all countries. In order to qualify as an intestate heir one must be alive (natural persons) or exist (legal entities) at the time the deceased's estate devolves (Art. 4:9 DCC).

The intestate heirs are listed in Art. 4:10 (1) DCC; they inherit in equal shares (Art. 4:11 (1) DCC).

Apart from the general rules of intestacy, there is at least one peculiarity in the Dutch system: the statutory division between the surviving spouse and the children (Art. 4:13 ff. DCC). If a deceased leaves a spouse and one or more children as heirs, then the 'statutory division' applies. By operation of law the spouse acquires the assets of the estate and is responsible for paying its debts. No cooperation on the part of the children is required. They have to be content with a monetary claim against the surviving spouse amounting to their share in the inheritance. The law provides that the children's claims against the spouse are only due and payable:

- (a) if the spouse is declared bankrupt or if a personal debt relief arrangement has been declared applicable with respect to the spouse;
- (b) when the spouse has died.

The claim is also exigible in the instances mentioned in a testamentary disposition of the deceased (if made).

The risk that these claims can no longer be recovered from the assets after the death of the spouse lies entirely with the children; it can be compared with the situation of an ordinary creditor and an insolvent debtor. However, in some cases (when the surviving spouse wants to remarry with another person, Art. 4:19-22 DCC) the surviving spouse is obliged, when the child so requests, to transfer to it assets with a value not exceeding such a pecuniary claim. Then the transfer is made subject to the usufruct of the assets, unless the surviving spouse waives this.

Unless otherwise provided by the deceased or by the spouse and child together, the pecuniary sum will be increased by a percentage corresponding to that of the statutory interest, to the extent that such a percentage exceeds 6% (Art. 4:13 (4) DCC). Since the Inheritance Law came into force the pecuniary sums have not increased with any percentage because of the percentage of the statutory interest.

In most cases in which the statutory division applies, the surviving spouse is likely to see it as an attractive division of the estate. However, in a small number of situations the spouse and the children may prefer to divide the assets in a different way. The question arises whether this is possible, once the estate has been transferred to the spouse by law by virtue of Art. 4:13 DCC. Art. 4:18 DCC shows that it is possible. Within three months of the day of devolution of the estate, the spouse can reverse the statutory division.

A reversal results in the creation of an undivided interest, since suddenly, with retroactive effect, it turns out that the estate has not been divided according to the statutory division. All the heirs have equal entitlements to the undivided interest; each is entitled to an undivided share in the estate amounting to their share in the inheritance. This provision can be important in cases where the business successor is a child.

Succession by testament takes place according to the provisions in the testament, although restricted in some ways by statutory law.

In the Dutch system, one can:

- Appoint an heir: An appointment of an heir is a testamentary disposition pursuant to which a testator leaves his or her entire estate or a share therein to one or more persons who are thereby designated (Art. 4:115 DCC).
- A bequest is a testamentary disposition by which a testator grants one or more persons a right of claim (Art. 4:117 (1) DCC).

- A testamentary obligation is a disposition by last will whereby the testator imposes an obligation on the joint heirs or on one or more determinate heirs or legatees not consisting in the execution of a bequest (Art. 4:130 (1) DCC).
- By testamentary disposition a testator may appoint one or more personal representatives (Art. 4:142 (1) DCC).
- By testamentary disposition a testator may institute a fiduciary administration over one or more assets which have been left by him or her or in respect of which he or she made a testamentary disposition bequest (Art. 4:153 (1) DCC).

One has to take into account that one can only make testamentary dispositions that are regulated in Book 4 DCC or are elsewhere so considered by law (Art. 4:42 (1) DCC).

Finally it is also possible to dispose of the estate by agreement that will be executed in the case of death. However, agreements which have as their necessary implication the disposal of a deceased's estates which have not yet devolved in their entirety or for a proportionate part are null and void according to Art. 4:4 (2) DCC.

2.2. Range of testamentary freedom

A testamentary disposition is a unilateral legal act whereby a deceased makes a disposition which will become operative only upon his or her death and which is regulated in the DCC or is so considered by law (Art. 4:42 (1) DCC). This means in general, that the last will must be regulated in the DCC or in another law, for example the Law on disposal of death.

There are basically three main ways of investing a bequest on a person in a last will:

- appoint the person as an intestate heir;

- leave him a bequest;
- encumber the inheritance with obligations on behalf of a person.

The main restrictions are the statutory or forced share of children (Art. 4:63 ff. DCC) and the statutory rights of some persons, like the right on usufruct of the surviving spouse and the right of maintenance of the children or the right of a remuneration in case a child worked in the deceased's household or in the conduct of the deceased's profession or business without having received a fitting remuneration for such work (Art. 4:28-30 DCC and Art. 4:35-36 DCC), as well as the statutory right (of the business successor) on goods belonging to businesses (Art. 4:38 DCC).

There are other restrictions, such as the requirement that one has to be alive or exist if being appointed an heir (Art. 4:56 (1) DCC). But there are certain exceptions with regards to this rule. There are prohibited dispositions on behalf of certain people or legal entities who have had a special relationship with the deceased, like mental or physical carers (Art. 4:59 DCC).

The compulsory portion or forced share to which a forced heir is entitled is the part' value of the deceased's estate which the forced heir may claim despite any testamentary dispositions made by the deceased. The forced share of a child of the deceased amounts to one half of the value over which the shares of forced heirs are calculated divided by the number of persons left behind by the deceased as mentioned in Art. 4:10 (1) DCC (Art. 4:64 DCC).

The Dutch inheritance law acknowledges the so called fideicommiss (de residuo) in Art. 4:56 DCC. In order to derive a right from a testamentary disposition one must be alive or exist at the time the estate devolves. One can appoint successive heirs limitless, as long as they fulfil the condition that they exist on the moment the testator has deceased. However, there are some restrictions when the testator wants to appoint heirs that not yet exist at the time he dies:

1) If a testator has provided that what he or she leaves to a descendant of the

deceased's parent shall accrue per stirpes, on the death of the person with an entitlement or at an earlier moment, to the latter's then living descendants, then a right from the testamentary disposition shall vest in them even if they were not yet alive at the testator's death (Art. 4:56 (2) DCC).

2) Where a testator has provided that what he or she leaves to somebody shall accrue on the death of the person with an entitlement or at an earlier moment to a descendant of the testator's parent, and also, if such a descendant will not survive such a time, that the latter's then existing descendants shall be substituted for him or her per stirpes, then such a right shall vest in them even if they were not yet alive at the testator's death (Art. 4:56 (3) DCC).

3) If a testator has provided that the capital remaining at the time of the testator's death without a withdrawal from capital having then been made by the person with an entitlement or having been made earlier shall accrue to a then living blood relative of the testator in the hereditary degree, the latter shall acquire this right even if he or she was not alive at the testator's death (Art. 4:56 (4) DCC).

The first two paragraphs of Art. 4:56 DCC refer to the normal fideicommiss, in which cases the first heir(s) is (are) not entitled the right to draw on the assets and to the right of alienation. The latter paragraph refers to the *fideicommiss de residuo*, where the first appointed heir has the rights to draw on the assets and to the right of alienation. In the latter case the group of family members that can inherit the deceased estate, or what is left of it, although not yet existing at the moment of the death of the testator, is larger. It includes all persons not further removed from the deceased than in the sixth degree (Art. 4:12 (3) DCC).

The relation between the first successor and the second is determined by the rules of usufruct (Art. 4:138 (2) DCC). As a result, he or she must reserve and maintain what was left as if he or she was a usufructuary unless the testator granted him or her the unconditional right to draw on the assets and to the right of alienation.

2.3. Statutory inheritance law

The Dutch system is as follows. Forced heirs (Art. 4:63 ff. DCC) and those who are entitled to a usufruct (Art. 4:29, 30 DCC), an amount of money (Art. 4:35, 36 DCC) or to certain goods on the basis of art. 4:38 DCC have to claim it. If they do not take action, they are not entitled to the claim. So it is not necessary to renounce.

Art. 4:29, 30 DCC provides a *usufruct* for the deceased's spouse on the dwelling and household effects and/or on any other assets of the deceased's estate (e.g. the enterprise) if there is a need for care. Although this is just a claim to establish a usufruct, it limits the testator in his free disposal over his estates. Depending on the need for care the subdistrict court can give the right to draw on the assets and the right of alienation.

A child of a deceased may claim a *lump sum*, to the extent that this is required:

- (a) for the child's care and upbringing until the child has attained the age of eighteen; and furthermore;
- (b) for his or her maintenance and education until the child has turned twenty-one (Art. 4:35 DCC).

Furthermore, a child, a stepchild, a foster-child, child-in-law or grandchild of the deceased who, having attained the age of majority, performed work in the deceased's household or in the conduct of the deceased's profession or business without having received a fitting remuneration for such work, may claim a *lump sum* constituting fair compensation (Art. 4:36 DCC). One should realize that in most cases this compensation for working in business can be claimed by the business successor. Therefore this statutory right is meant to and can facilitate the succession.

There are two provisions in the DCC that are especially relevant in this perspective. The first claim that can be exercised on *certain goods* of the deceased estate, is the claim of children or step-children based on Art. 4:38 DCC, on assets belonging to the deceased's estate or the dissolved

matrimonial community of property used in the conduct of a profession or business by the deceased, when the child or step-child or the deceased's spouse will continue the same.

Apart from these provisions which grant specific claims to certain family members, the law provides for a forced share to which a forced heir is entitled. This forced share is the part' value of the deceased's estate which the forced heir may claim despite any and testamentary dispositions made by the deceased. The forced share of a child of the deceased amounts to one half of the value over which the shares of forced heirs are calculated divided by the number of persons left behind by the deceased as mentioned in Art. 4:10 (1) DCC. Art. 4:80 (1) DCC makes it clear that a forced heir has a *monetary claim* amounting to his or her legitime against the joint heirs or, if the estate has been divided in accordance with Art. 4:13 DCC, against the deceased's surviving spouse.

2.4. Business succession

In corporate law, no specific attention has been paid to business succession. However, as mentioned before, to ensure continuity of the business, the control of the family business is in practice separated from the financial interest in the company by transferring all the shares to a foundation, which legal entity issues certificates to the entrepreneur. Thus, the control over the company is vested upon a foundation and separated from the holder of the financial interest in the company. During lifetime the entrepreneur controls in many cases as sole board member of the foundation the business. But when he dies, the appointment of persons as his successors in the board of the foundation takes effect. The entrepreneur is free as to whom he wants to appoint as his successors in the board of the foundation. These can be heirs or other family members. But he can also appoint other persons.

Furthermore, as also mentioned before, one has to take in account that the legislative rules governing Dutch private limited liability companies (BVs) as set out in Book 2 of the DCC have been simplified and made more flexible.

This is a consequence of the introduction of the Act on the Simplification and Flexibilisation of the Law governing BVs ('Wet vereenvoudiging en flexibilisering bv-recht') and the related Implementation Act on the Simplification and Flexibilisation of the Law governing BVs ('Invoeringswet vereenvoudiging en flexibilisering bv-recht'). These two Acts are jointly referred to as the 'Flex BV Act'. The Flex BV Act came into effect on 1 October 2012. In practice this new legislation means less prescriptive law and more permissive law, that allows BVs more scope to deviate in their articles of association from the legal standard procedure. This scope can (and is/will) also be used for structuring the succession in family businesses.

The shares in a company or the assets of a business of the share in a partnership, follow the normal rules of intestate or testamentary succession. In principle, the heirs have an equal share in the inheritance, unless otherwise provided by the deceased. It is up to the heirs to decide on the division of the estate.

However, provisions in the articles of association might force the heirs to transfer assets or shares to the left partners or a third partner, or even one of the heir(s) who is the intended successor.

In case of a statutory division (Art. 4:13 ff. DCC) the deceased's spouse will receive the assets or the shares. Furthermore, a sole heir can be pointed out by the deceased in his last will and testament. And provisions in the partnership agreement or the articles of association might prevent the shares from being split between the heirs.

In the Netherlands there are no special regulations for the business succession in specific areas, such as agriculture.

3. Legal incapacity before death

3.1. Special statutory provisions or regulations in case of dementia

In case of temporary or permanent incapacity, for instance when a shareholder suffers from dementia, it is possible to appoint a custodian to the

shareholder. The Art. 1:431 ff. DCC contain the legal framework under which the custodian has to perform his duties. This custodian will then be responsible to exercise all rights of the shareholder on behalf of the shareholder and subject to the provisions laid down in the law.

Recently, it has become very popular to make a so called 'living will'. This is a legal instrument to make arrangements in case of incapacity. A living will contains usually a power of attorney or an assignment. All sorts of things can be arranged in such a document. If it is a power of attorney, it is an unilateral legal act; if it is an assignment, it is a two sided contract.

3.2. Precautions in the articles of associations

There are no specific provisions in company law for the legal incapacity of a shareholder or a director. However, it is possible that the articles of association or the partnerships agreement contain provisions with regard to the situation of permanently incapacity to act. For instance by appointing a representative.

4. Consequences for a business in case of a death

4.1. Differentiation between the types of enterprises

Dutch legal practice generally uses two types of legal entities in case more than one entrepreneur work together:

- private limited liability company ('Besloten vennootschap met beperkte aansprakelijkheid');
- partnership ('vennootschap onder firma').

The entrepreneur holds shares in a private limited liability company or has a share in the partnership's assets and liabilities.

In case the entrepreneur has the business by himself, he can own all the shares of a private limited liability company or own all the assets and liabilities of the business.

4.2. Consequences in case of death

The business of a sole proprietor will pass to the heirs according to the normal rules of intestate or testamentary succession.

As set out before, one of the basic principles of Dutch Inheritance law is the *saisine*, or: 'Le mort saisit le vif' (Art. 4:182 DCC). This means that on the death of an person, the heirs succeed by operation of law to the rights capable of transmission and to whatever the deceased possessed or held; they also become obliger of the liabilities and obligations of the deceased that are not extinguished by his death. Thus a business can be passed down without co-operation, transfer, permission etc.

A partnership will dissolve if there are no special provisions in the partnership contract. It is possible to have provisions in the partnership agreements or the articles of association of a company by which the left partners can take over the share of the deceased partner in the partnership or the shares in the company. Company Law prevails Inheritance Law. In most partnership contracts, the parties to the contract agreed to continue the partnership with the remaining partners. Then, the partnership *de facto* ends only with regard to the deceased partner.

The forementioned provisions in partnership agreements are called 'survivorship clause' or 'acquisition clause'. The share will devolve to the remaining partners by operation of law under the survivorship clause or when the remaining partners claim for the transfer under the acquisition clause. In both cases delivery of the share in the goods of the partnership to the remaining partners is necessary.

There are no limitations with regard to these kinds of contractual arrangements. However, agreements which have as their necessary implication the disposal of a deceased's estates which have not yet devolved in their entirety or for a proportionate part shall be null and void according to Art. 4:4 (2) DCC.

The only aspect to be considered (in case of a legitimate agreement) is that in some cases a gift or a contractual beneficiary upon death, will be considered as a bequest (Art. 4:126 DCC).

The shares of a partner will pass to the heirs according to the normal rules of intestate or testamentary succession. However, special provisions apply according to most partnership agreements and/or articles of association if the shares are held by the heirs of the deceased shareholder. As stated before, company law prevails inheritance law.

4.3. Destiny of a share

The heirs will acquire the estate, thus also the shares in the company. In the articles of association of companies usually it is stipulated that the heirs as new shareholders have to offer the shares for sale to the other shareholders for a price equal to the value to be agreed upon or to be determined by valuers or as set out in the articles of association. The articles of association may contain exceptions to this obligation, for example when the heirs meet some qualitative requirements or when the heirs are in a certain family relationship to the deceased. Sometimes, it is stated in the articles of association that they are only obliged to offer the shares of the deceased if the heirs do not meet the requirements of being shareholder. So one could say that in those cases this provision contains a form of obligatory sale of shares.

Art. 4:38 DCC states that on the application of a child or stepchild of the deceased, provided the child or stepchild has an important interest therein and, compared therewith, this will not be to the serious detriment of any person with an entitlement, the subdistrict court may order the person with an entitlement to transfer to the child or stepchild or to the deceased's spouse, at a reasonable price, assets belonging to the deceased's estate or the dissolved matrimonial community of property used in the conduct of a profession or business by the deceased, when the child or step-child or the deceased's spouse will continue the same. This applies, *mutatis mutandis*

with respect to shares in a company limited by shares or a private company with limited liability of which the deceased was a director and in which the deceased, alone or together with his or her co-directors, held a majority of the shares, if, at the time of death, the child or stepchild or the deceased's spouse was a director of such a company or thereafter continues the position of the deceased (Art. 4:38 (2) DCC). This provision does not give a claim on business succession but a claim to the business successor!

However, according to Art. 4:38 (3) DCC this applies only to the extent this is not barred by the provisions in the articles of association on the transfer of shares. The right to make an application referred to Art. 4:38 (1,2) DCC shall lapse on the expiry of one year from the death of the deceased (Art. 4:38 (4) DCC).

4.4. Provisions in the articles of association

As stated before, the Flex BV Act came into effect on 1 October 2012. In practice this new legislation means less prescriptive law and more permissive law, that allows BV's more scope to deviate in their articles of association from the statutory standard. One of the important changes regarding this question is the removal of the statutory requirement to include a share transfer restriction clause in the articles of association. This clause had to stipulate that a shareholder could only transfer the shares held to a third party either following approval from the designated body within the BV or after having offered the shares to the other shareholders. In legal practise all kind of provisions are possible, are developed and are used. Heirs can be excluded by means of inheritance law and/or company law, with or without compensation. Of course with respect to their forced heirship. The bottom line however is, that the articles of association may not make it impossible or extremely onerous to transfer shares (Art. 2:195 (5) DCC).

4.5. Exercise of the shareholder's rights after his death

It is a general principle of Dutch law that the heirs are in charge of the administration of the deceased estate, the inheritance. However, in some

cases the administration is in the hand of an testamentary executor appointed by the deceased or an administrator being the heirs or a person appointed by the judge. This is the case, for instance when an heir accepts the inheritance 'beneficiar' as described before. Art. 4:202 ff. DCC on the liquidation of estates apply then. In principle, the joint heirs are responsible to settle the estate unless the court appoints a person or persons as the administrator upon request.

In most articles of association it is stated that if the heirs as shareholders have not complied with the obligation to offer and transfer their shares or part thereof in the instances described in these articles within a fixed reasonable period, the company will be irrevocably authorised to offer and transfer the shares (Art. 2:192 (5) DCC)

5. Last Wills

5.1. Range of a last will

Last wills can include dispositions of businesses or shares, although the provisions laid down in the partnership agreement or the articles of association take precedence in case of conflict.

One can nominate another heir in case the original drops out, both the intestate heir as well as the testamentary heir. In so far no heirs are appointed, the business will devolve on the intestate heirs according to the law. As stated before, the Dutch inheritance law also acknowledges the so called fideicommiss (de residuo) in Art. 4:56 DCC.

5.2. Requirements and conditions

Some general provisions apply on making last wills. For instance, with regard to the people that can be given a bequest (e.g. mental or physical carers; Art. 4:59 DCC). A condition or testamentary obligation which is impossible to fulfil or is contrary to bonos mores, public policy or a mandatory statutory provision shall be deemed not to have been written. A disposition subject to the

condition or burden is null and void, if this was its decisive motive for such a disposition. A condition or burden which has as its necessary implication the exclusion of the right to alienate or encumber assets is deemed not to have been written (Art. 4:45 DCC).

Furthermore, Art. 4:140 (1) DCC decrees that, where a condition attached to an appointment as heir is not fulfilled thirty years from the death of the testator, then the disposition will lapse when it is a suspensive condition; if it is a condition subsequent, then the condition will lapse. This article does not apply to the fideicommiss (Art. 4:141 DCC).

5.3. Other forms

In most cases the partners agreed to allocate the share of the deceased partner to the remaining partners. These provisions are called 'survivorship clause' or 'acquisition clause'. The share will devolve to the remaining partners by operation of law under the survivorship clause or when the remaining partners claim for the transfer under the acquisition clause. In both cases delivery of the share in the goods of the partnership to the remaining partners is necessary. In some cases an acquisition clause is made on behalf of the intended successor (Art. 7A:1688 DCC), like for example the son of the deceased, who is already working in the family business. In that case the remaining partners have to accept the intended successor beforehand.

Similar agreements can be made for shares in a private limited liability company, both in a contract or in the articles of association.

6. Right to a compulsory portion

6.1. Institute of compulsory portion or a similar national institute

The testator is free to dispose of his property as he wishes. No heir has a forced share on the goods of the deceased estate. But there are certain provisions in the inheritance law, that provides certain relatives a claim in money or on goods.

When a dwelling in which the spouse of the deceased is living at the latter's death constitutes part of the deceased's estate or of the dissolved matrimonial community of property or the deceased had a right to its use otherwise than pursuant to a tenancy, the spouse has a right as against the heirs to continue to live there (and use the household effects) for a period of six months on the same terms as were previously applicable (Art. 4:28 DCC).

To the extent, as a result of any testamentary disposition of the deceased, the deceased's spouse is not or is not solely entitled to the dwelling which forms part of the deceased's estate in which the deceased and the spouse had lived together or where the spouse was living alone at the time of the death or to the household effects which constitute part of the deceased's estate, the heirs must cooperate in establishing a usufruct on behalf of the spouse to that dwelling and, those household effects to the extent the latter requires them to do so (Art. 4:29 (1) DCC).

When so required from them, the heirs must cooperate in establishing usufruct with respect to any other assets of the deceased's estate other than those referred to in Art. 4:29 DCC on behalf of the spouse of the deceased, to the extent, having regard to the circumstances, the spouse needs and demands their cooperation for the spouse's support (Art. 4:30 (1) DCC).

A child of a deceased may claim a lump sum, to the extent that this is required:

- (a) for the child's care and upbringing until the child has attained the age of eighteen; and furthermore;
- (b) for his or her maintenance and education until the child has turned twenty-one (Art. 4:35 DCC).

Furthermore, a child, a stepchild, a foster-child, child-in-law or grandchild of the deceased who, having attained the age of majority, performed work in the deceased's household or in the conduct of the deceased's profession or business without having received a fitting remuneration for such work, may claim a lump sum constituting fair compensation (Art. 4:36 DCC). One should

realize that in most cases this compensation for working in business can be claimed by the business successor. Therefore this statutory right is meant to and can facilitate the succession.

Art. 4:38 DCC states that on the application of a child or stepchild of the deceased, provided the child or stepchild has an important interest therein and, compared therewith, this will not be to the serious detriment of any person with an entitlement, the subdistrict court may order the person with an entitlement to transfer to the child or stepchild or to the deceased's spouse, at a reasonable price, assets belonging to the deceased's estate or the dissolved matrimonial community of property used in the conduct of a profession or business by the deceased, when the child or step-child or the deceased's spouse will continue the same. This applies, *mutatis mutandis* with respect to shares in a company limited by shares or a private company with limited liability. This provision does not give a claim on business succession but a claim to the business successor.

The forced share to which a forced heir is entitled is the part' value of the deceased's estate which the forced heir may claim despite any and testamentary dispositions made by the deceased. Forced heirs are such descendants of the deceased as the law designates as intestate heirs to the deceased's estate, either based on their own right or by a right of representation with regard to persons who are no longer alive unworthy at the time of devolvement of the deceased's estate (Art. 4:63 ff. DCC). The forced share of a child of the deceased amounts to one half of the value over which the shares of forced heirs are calculated divided by the number of persons left behind by the deceased as mentioned in Art. 4:10 (1,a) DCC (Art. 4:64 (1) DCC).

6.2. Right to a compulsory portion and business succession

In Book 4 of the DCC there are two specific facilities related to statutory rights and business succession.

At first, on the application of a child or stepchild of the deceased, provided the

child or stepchild has an important interest therein and, compared therewith, this will not be to the serious detriment of any person with an entitlement, the subdistrict court may order the person with an entitlement to transfer to the child or stepchild or to the deceased's spouse, at a reasonable price, assets belonging to the deceased's estate or the dissolved matrimonial community of property used in the conduct of a profession or business by the deceased, when the child or step-child or the deceased's spouse will continue the same (Art. 4:38 (1) DCC). This provision does not give a claim on business succession but a claim to the business successor, as stated before.

The preceding applies, *mutatis mutandis*, with respect to shares in a company limited by shares or a private company with limited liability of which the deceased was a director and in which the deceased, alone or together with his or her co-directors, held a majority of the shares, if, at the time of death, the child or stepchild or the deceased's spouse was a director of such a company or thereafter continues the position of the deceased (Art. 4:38 (2) DCC). The preceding applies only to the extent this is not barred by the provisions in the articles of association on the transfer of shares (Art. 4:38 (3) DCC).

Furthermore, the cash value of a bequest of a pecuniary sum payable in instalments to a forced heir will also in the case of renunciation be deducted from the forced share, if the last will provides that without such a disposition it would make it difficult to continue a profession or business of the deceased to a serious extent. (Art. 4:74 (1) DCC). A forced heir may, within three months after the death of the deceased, declare to demand payment of the cash value in a lump sum, if the ground stated is incorrect. The burden of proof rests with a person who maintains that the ground is correct. Where the stated ground is correct but allows payment to be made earlier in instalments, then the court may alter the obligation arising from the bequest in such manner (Art. 4:74 (2) DCC). If a forced heir so requests within three months after the death of the deceased, the subdistrict court may order the persons burdened with the bequest to put up security. The subdistrict court will set the amount and type of the security. Where this is not complied with, within the term set

by the subdistrict court for this purpose, the bequest shall not be deducted from the forced share if the forced heir then still renounces the bequest (Art. 4:74 (3) DCC).

In other words: The value of a bequest payable in instalments will also in the case of renunciation be deducted from the legitime, if the will provides that without such a disposition the continuation of the business of the deceased would be in danger. One could say that the freedom of testation takes priority over the mandatory claims of descendants in case the continuation of the business would be in danger.

On top of the fact that a forced heir as such does not have a right in rem but only a monetary claim on the heirs, as stated before.

In the Netherlands we have no provisions for specific business areas. Traditionally agricultural companies need provisions more than other companies.

6.3. Calculation of the compulsory portion

The forced share of a child of the deceased amounts to one half of the value over which the shares of forced heirs are calculated divided by the number of persons left behind by the deceased as mentioned in Art. 4:10 (1,a) DCC (Art. 4:64 (1) DCC).

So the children can claim 50% of their intestate share in money (calculated according to certain rules, including certain gifts (Art. 4:65 DCC)), when they are all excluded from heirship by the parent.

According to Art. 4:6 DCC, the term 'the value of the assets of the deceased's estate' means the value of such assets at the *time* immediately following the death of the deceased. The law (DCC or any other civil law) does not provide any description of the value of the deceased's assets to be taken into account for the aforesaid calculation, nor a description of definitions regarding value, valuation principles and valuation methods and relevant factors. In some

articles (outside Book 4 DCC) one can find references to valuers who have to estimate the value of property, but without any concrete guidelines they can use for their valuation.¹³

6.4. Renunciation of inheritance

An heir may accept or renounce a deceased's estate. Acceptance may take place unconditionally or subject to the privilege of an inventory of the estate ('beneficiary').

A deceased may not restrict the heirs in their choice (Art. 4:4 (1) DCC). An heir may also not take a decision in that respect prior to the devolvement of the deceased's estate (Art. 4:190 (2) DCC). A choice once made is irrevocable and has retroactive effect to the time when the deceased's estate devolved. An acceptance or renunciation may not be nullified on account of mistake or on the ground that it is to the detriment of creditors (Art. 4:190 (4) DCC).

7. Anticipated succession and the maintenance of the transferor's shareholder position

There is no anticipated *succession* in Dutch Law in the way succession of an inheritance takes place, 'transfer by general title' is not available. But, of course, transfer to the intended successor *inter vivos*, whether or not for valuable consideration, takes place quite often.

In the Netherlands, it is possible to transfer sole proprietorship, a share in a partnership or shares in a company in anticipation of the decease of an entrepreneur with effect as from that moment on. In the agreement the entrepreneur agrees that the heirs are obliged to transfer the business or share in a partnership or company to whoever is stipulated in the agreement, whether this person is a relative, a business partner or any other third party.

¹³ See for elaborate research on value in Inheritance Law, Matrimonial Law and in the Dutch Inheritance and Gift Tax Act 1956, the doctoral thesis of Wouter Burgerhart; W. Burgerhart, *Waarde en Erfrecht* (thesis Nijmegen), Deventer: Kluwer 2008.

In the Dutch system, acquisition of property takes place on the basis of a transfer agreement that has to be executed through delivery. According to Art. 3:84 (1) DCC transfer of property requires delivery pursuant to a valid title by the person who has the right to dispose of the property. In the Netherlands, we have a causal system of acquisition of property. This also applied on the transfer of a business or shares in a partnership or company. Debts and contracts must also be taken over by the successor according to the rules (see for instance art. 6:155-159 DCC). As stated before, we do not have a 'transfer by general title' (Art. 3:80 (2) DCC).

If the price equals the (market) value for the business, the transaction is qualified as a purchase. If the price does not equal the full (market) value, but (with the intention to enrich the donee) for free or against payment of just part of the value or more than this value, the Dutch law considers it as a gift or a mixed contract. If the endowment is part of for instance a partnership's contract, this is also qualified as a gift. Therefore a distinction between endowment/purchase or another contractual agreement cannot be made. When business succession takes place within a family about 60% of all transfers holds an endowment; outside the family this percentage is (average) about 10%.¹⁴

Generally speaking, transfer agreements contain provisions with regard to the change of leadership and/or controlling functions. There is a wide range of possibilities that are used in the Netherlands, but no specific model or (statutory) provisions. It depends on the facts and circumstances of each case. Every transfer and agreement on the maintenance of the transferor are based on the general principles of the DCC.

According to Dutch law, the company can issue shares without financial interest, i.e. shares which do not entitle to a share of the profit of the company. It is also possible to issue shares to the successor which do provide a financial interest, but no voting rights. Secondly, it is possible to be

¹⁴ Burgerhart, Hoogeveen, Egger, Civiele en Fiscale bedrijfsopvolgingsfaciliteiten, Een praktijkonderzoek, 2009, p. 16.

appointed as a member of the supervisory board of a company, which often has the power to approve certain well defined decisions of the directors. Another option is to issue so called priority shares. These shares can be given special rights with regard to for example appointment of directors, the approval of certain, well defined proposals, etc. Another option is that when the transferor holds shares in a company, these shares are converted in cumulative preference shares whereas new shares are issued to the successor. These cumulative preference shares generate income from the company profits, as if the value of the shares would have been invested in bonds. After deducting the dividend to be paid on the cumulative preference shares, the remaining profit is at the disposal of the new shareholder. By doing so, the successor does not need to borrow money to pay the transferor. This might be cheaper, whereas the solvability of the company is maintained. But, of course, the transferor runs a certain risk.

Another option would be to transfer the shares and at the same time establish a right of usufruct on behalf of the transferor.

It is impossible to give an exhaustive list of ways by which aforementioned demands are taken into account in a business succession. Many different ways are leading to Rome, as we say in the Netherlands.

8.Foundation and Trusts as instruments for business succession

8.1. Set up of a foundation

According to Art. 4:135 DCC when a testator has left by last will something to a foundation which he or she has created by a testamentary disposition made by notarial instrument, the foundation will be heir or legatee, depending on whether what was left constitutes appointment as an heir or a bequest (Art. 4:135 (1) DCC).

A notarial instrument is required to set up a foundation.

A business can be run by any legal entity. It also can serve the purpose to

maintain the family or legal successors. Apart from the above mentioned Art. 4:135 DCC, in practice entrepreneurs use the instrument of a foundation to which the shares of a company are transferred, as stated before. The foundation issues certificates to the entrepreneur, which are inherited by the heirs as part of the inheritance. The control of the family business is separated from the financial interest in the company by transferring all the shares to a foundation, which legal entity issues certificates to the entrepreneur. This instrument is used to ensure continuity of the business, whereas the holders of the certificates are entitled to the revenues from the business.

There is no minimum nor a maximum duration for a foundation.

8.2. Influence of family members in a foundation

The appointment of the board of the foundation is provided for in the articles of association. The main rule is, that the board appoints the successors of their members. In family foundations usually one or more family members are appointed as board member. The founder is free in shaping the way the board members shall be appointed. The board can be composed of only family members or a combination of family members and third trusted parties, like an independent legal council (lawyer or notary) or an auditor. It is also possible that third parties appoint one or more board members.

As mentioned before, the beneficiaries in most cases are the holders of certificates. The transferability of claims (such as certificates) can be excluded by agreement (Art. 3:83 (2) DCC). Rights of appointment can be attributed to holders of certificates. It is also possible that some decisions of the board of the foundation are subject to prior consent of the holders of certificates. Finally, changing the articles of association can be made subject to the prior consent of the holders of certificates. There are no specific statutory provisions for beneficiaries of (family) foundations; it all depends on the articles of the association.

8.3. Distinction to the Trust

The Dutch Civil law does not know the instrument of the trust as such. But according to the The Hague Trust Treaty 1985 and the Conflict Law on Trusts 1995, the Dutch Law acknowledges the trust under certain circumstances. Prior to January 1, 2010, Dutch tax legislation did not include provisions regulating the taxation of a trust simply because entities, such as a trust, did not exist under Dutch law. Accordingly, the foreign tax qualification for entities was not automatically followed by the Dutch Tax Authorities. Qualification took place on a case-by-case basis. If the trust or legal entity was deemed transparent pursuant to Dutch legislation, the beneficiaries were taxed instead of the trust or legal entity. If they were non-transparent, the trust or legal entity was taxed. As each case needed to be assessed individually there was great uncertainty. Consequently, Dutch tax law was amended and the 'Dutch trust' (APV)¹⁵ was introduced. All APV's are now deemed transparent and thus it is important to know if a foreign entity meets the requirements of an APV. A foreign entity qualifies as a trust if the founder of the entity contributed private capital (without shares in return) to the entity, and the entity was established to primarily (for more than 10-15%) serve private interests (or the interests of his family or relatives).

The main difference is that - as mentioned before – Dutch Law does not acknowledge the trust as such, while the foundation is a more or less similar instrument regulated by the DCC.

9. Further developments

On this moment there are no legal policy plans for business succession as such. However, recently proposals were done for changes in Matrimonial Law that can effect business succession. In short this proposal changes the community of property between spouses. This community comprises all property assets and all liabilities of the spouses, at the commencement of the community and acquired afterwards. According to the proposal the community of property in the future will neither comprise the assets and liabilities at the

¹⁵ APV is the abbreviation of 'Afgezonderd Particulier Vermogen', in English 'Segregated Private Estates'.

commencement of the community nor property acquired pursuant to intestate or testamentary succession and gifts.

In time being no other proposals in Dutch Civil law are relevant for business succession as such, nor academic discussions on this topic as far as we know. There is however a significant development in case law; the inheritance law of 2003 has found its way to the courts, even to the Supreme Court of the Netherlands. A fast growing number of cases on inheritance law is brought into court. Book 4 of the DCC has (finally) landed in the Dutch society.

In Dutch Tax Law however family business succession was 'talk of the town', as well in academic circles as in society, in recent years. The cause of this all is the tax exemption for business succession. The acquisition of an inheritance and gifts are taxed according to the Dutch Inheritance and Gift Tax Act 1956. Since January 1st 1997 there are specific provisions on the acquisition of businesses. This law has been changed numerous times. As from January 1st 2010, the most recent change, the succession in businesses is partly exempted from taxation if the statutory conditions are being met. In short, each enterprise holds a tax exemption of approximately € 1.000.000 in combination with a tax exemption of 83% of the value of the enterprise succeeding this amount.

In many cases in recent years (after a sensational decision of a tax court on July 13th 2012¹⁶) complaints of discrimination were made that the exemption applicable to estates and gifts worth up to one million euros (and the succeeding value to 83%) which was enjoyed by those entitled to the facility for enterprise succession did not apply to 'non-succession acquisitions'. The Dutch Supreme Court rejected the complaints on November 22th 2013.¹⁷ The European Court of Human Rights did more or less the same on May 27th 2014.¹⁸

¹⁶ ECLI:NL:RBBRE:2012:BX3386.

¹⁷ ECLI:NL:HR:2013:1206.

¹⁸ <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145239>

As far as we know there are no elaborated plans to change the tax exemptions on family businesses. However studies in recent years have shown that the succession facilities in different tax laws can be improved. We think that it depends on the politics if and when the relevant laws will be changed.